

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
CENTRAL PUGET SOUND REGION
STATE OF WASHINGTON

TOWARD RESPONSIBLE DEVELOPMENT, et
al,

Petitioner,

v.

CITY OF BLACK DIAMOND,

Respondent,

and

BD LAWSON PARTNERS, LP and BD VILLAGE
PARTNERS, LP,¹

Intervenors.

Case No. 10-3-0014

CERTIFICATE OF APPEALABILITY

**[King County Superior Court
No. 11-2-07352-1 KNT]**

THIS Matter comes before the Board upon the application of Petitioners Toward Responsible Development, et al for a Certificate of Appealability for direct review by the Court of Appeals.² No response – either in support or opposition - was filed by either Black Diamond or YarrowBay.

I. AUTHORITY AND ANALYSIS

Petitioners filed a Petition for Review with the Board seeking review of the City of Black Diamond's approval of two master planned developments (MPDs) – Lawson Hills and The

¹ Intervenors are collectively referred to as YarrowBay.

² Application for Direct Review by the Court of Appeals, filed March 17, 2011.

1 Villages – asserting various violations of the Growth Management Act, RCW 36.70A
2 (GMA), and the State Environmental Policy Act, RCW 43.21C (SEPA).³

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4 Petitioners, Black Diamond, and YarrowBay all filed dispositive motions, the primary
5 question presented with these motions being whether the Board had subject matter
6 jurisdiction to hear the appeal. On February 15, 2011, the Board issued its Order on
7 Motions finding not only that it had jurisdiction to hear the appeal but that Black Diamond
8 had violated the GMA's requirements for public participation by processing the challenged
9 MPD ordinances as project specific applications rather than as subarea plans/development
10 regulations.⁴ The Board remanded the ordinances to Black Diamond, reserving decision on
11 all other substantive issues presented until such time as the GMA's public participation
12 process was completed.⁵ However, the Board declined to issue a Determination of
13 Invalidity but set an expedited schedule for Black Diamond's compliance with GMA public
14 participation requirements.⁶

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17 On February 17, 2011, Intervenor Yarrow Bay filed a Petition for Review of Agency Action in
18 King County Superior Court, Cause No. 11-2-07352-1 KNT, appealing the Board's February
19 15 Order on Motions. The primary emphasis of the appeal was the Board's determination
20 that it had jurisdiction over the MPD ordinances, which YarrowBay contends resulted in the
21 Board engaging "in an unlawful review of the challenged ordinances" and rendering "a
22 decision on public participation outside of the Board's jurisdiction."⁷ On April 8, 2011, the
23 King County Superior Court issued a stay of the Board's February 15 Order on Motions.⁸

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26 Pursuant to the Administrative Procedure Act, RCW 34.05.518, Petitioners seek a
27 Certificate of Appealability. RCW 34.05.518(3) identifies growth management boards as

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30 ³ Filed November 19, 2010.

31 ⁴ February 15, 2011 Order on Motions, at 20-21, 25

32 ⁵ February 15, 2011 Order on Motions, at 25

⁶ February 15, 2011 Order on Motions, at 26

⁷ Yarrow Bay Petition for Review, at 8-10

⁸ Order Granting Stay of Compliance Schedule, issued by the Honorable Judge Cheryl Casey.

1 “environmental boards,” and establishes the following criteria for a certificate of
2 appealability: (Emphasis added)

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4 (b) An environmental board may issue a certificate of appealability if it finds
5 that **delay in obtaining a final and prompt determination of the issues**
6 **would be detrimental** to any party or the public interest **and either:**

7 (i) **Fundamental and urgent statewide or regional issues** are raised; or

8 (ii) The proceeding is likely to have **significant precedential value**.
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10 RCW 34.05.518(4) requires a board to state in its certificate of appealability “which criteria it
11 applied [and] explain how that criteria was met.” This Board reviews the Petitioners’ request
12 for certification in light of each of these criteria.
13

14 **A. Detrimental Delay**

15 This is a threshold question as the Board may not issue a Certificate of Appealability unless
16 delay would be detrimental to any party or the public interest. Petitioners cite to the
17 importance of finality and certainty in land use decisions and how a prompt resolution would
18 avoid unnecessary delay and expense.⁹ Petitioners further note that given the extensive
19 size of the approved MPDs, covering approximately 1,500 acres, uncertainty regarding
20 development not only results in residents of the community but also neighboring jurisdictions
21 being in “limbo pending resolution” of the litigation.¹⁰ Specifically, Petitioners cite to
22 planning for transportation and public schools in the surrounding communities.¹¹
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26 The Board further notes that the stay issued by King County Superior Court relieves Black
27 Diamond of any efforts to achieve compliance until the court issues a final decision.¹² In
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29 ⁹ Application for Direct Review, at 3-4.

30 ¹⁰ Application for Direct Review, at 4.

31 ¹¹ Application for Direct Review, at 4-5 (Neighboring jurisdictions include the cities of Maple Valley, Covington,
32 and Enumclaw as well as unincorporated areas of King County. The Enumclaw School District serves the
land encompassed by the MPDs).

¹² Stay issued on April 8, 2011 by the Honorable Judge Cheryl Carey.

1 addition, because the Board did not find grounds for a Determination of Invalidity,
2 applications for development may proceed and vest during the pendency of the appeals.¹³

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4 In the matter before us, the Board finds that delay in resolution of this matter would be
5 detrimental to Petitioners in that vesting of development rights under a non-compliant
6 ordinance will likely proceed and render some or all of the GMA planning issues moot
7 before a determination of the issues raised. The Board further finds delay would also be
8 detrimental to the City of Black Diamond's interest as to certainty concerning the orderly
9 development of annexed lands and to Yarrow Bay's interest in certainty of land use rights.
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11 In addition, the Board finds delay would be most detrimental to the public interest. The
12 GMA is predicated on coordinated planning for urban growth and the necessary urban
13 infrastructure and services under an open legislative process.¹⁴ It is in the public interest to
14 have a prompt resolution of the dividing line between comprehensive GMA planning and the
15 types of land use matters that may be decided by the City in a non-GMA, quasi-judicial
16 process.
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19 **Conclusion:** For the reasons stated above, the Board finds delay in this matter would be
20 detrimental to each of the parties and to the public interest.
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22 **B. Fundamental or Urgent Statewide or Regional Issues Raised**

23 Petitioners argue the impacts of the MPDs would not be limited to Black Diamond, but
24 reiterate that impacts will resonate throughout several cities in Southeast King County,
25 including Maple Valley, Covington, Auburn, and Enumclaw. Petitioners note these cities
26 participated and commented on the MPDs but state that delay in resolving the appeal would
27 "unnecessarily protract resolution of [transportation and other infrastructure] fundamental
28 and urgent regional issues."¹⁵
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32 ¹³ February 15 Order on Motions; March 17 Motion for Reconsideration

¹⁴ RCW 36.70A.010 Legislative Findings

¹⁵ Application for Direct Review, at 5

1 The Board finds a fundamental issue of GMA jurisdiction is raised that has regional and
2 perhaps statewide significance. This case presents the question of whether the planning for
3 land encompassing two-thirds of Black Diamond's municipal area can be undertaken by
4 considering a development application from an individual developer in a non-GMA quasi-
5 judicial process. Other cases pending before the Board raise similar issues.¹⁶
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8 GMA planning requirements for each city and county include "mandatory elements" for
9 capital facilities, transportation, parks, and utilities that must be consistent with land use,
10 housing and economic development elements.¹⁷ In a proper GMA planning process with
11 full public participation, a city or county should *inter alia* (1) ensure that public facilities and
12 services necessary to support development will be adequate to serve the development
13 when available for occupancy without decreasing current service levels below established
14 standards; (2) encourage efficient multimodal transportation systems based on regional
15 priorities and coordinated with city/county comprehensive plans; (3) retain open space,
16 enhance recreational opportunities, conserve fish and wildlife habitat, and increase access
17 to natural resource lands and water; (4) protect the environment and the state's high quality
18 of life; and (5) protect private property rights. These are some of the GMA planning
19 mandates and goals that may not be meaningfully considered if area-wide planning is
20 allowed to proceed through developer negotiations.
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24 **Conclusion:** For the reasons stated above, the Board finds this matter involves issues of
25 fundamental regional, and perhaps statewide, importance.
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27 C. Significant Precedential Value

28 Petitioners contend this appeal is likely to have significant precedential value regarding the
29 jurisdictional issue, especially given YarrowBay's assertion that the Board's holding on this
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32 ¹⁶ *City of Shoreline, et al v. Snohomish County*, CPSGMHB Coordinated Case Nos. 09-3-0013c/10-3-0011c

¹⁷ RCW 36.70A.070

1 issue “upsets decades of established case law.”¹⁸ In addition, Petitioners state resolution by
2 the Court of Appeals would provide “greater clarity on the placement of master plans in the
3 GMA-LUPA firmament ... [so as to] be of significant assistance in future cases,” especially
4 given the increased use of master plan developments.¹⁹
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6 Although RCW 34.05.518(3) only requires the Board to find that the matter either has
7 fundamental regional issues *or* significant precedential value, and having found that the
8 issues presented are of fundamental regional importance, the Board does not need to
9 address the precedential value of this matter. However, the Board does note that a ruling
10 by the Court of Appeals which clarifies the Board’s jurisdiction when an area-wide land use
11 action is denominated a “Master Plan” would provide important guidance for not only the
12 Board but also for GMA-planning jurisdictions throughout the state.
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15 **Conclusion:** For the reasons stated above, the Board finds this matter has significant
16 precedential value.
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18 II. ORDER

19 Having reviewed the Petitioners’ Application for Direct Review by the Court of Appeals, the
20 relevant provisions of the Administrative Procedures Act, in particular RCW 34.05.518(3)(b),
21 and the facts of this matter, the Board finds that delay in obtaining a final and prompt
22 determination of the issues will be detrimental to all parties and to the public interest. The
23 Board further finds that fundamental issues of regional importance are raised and that a
24 judicial determination is likely to have significant precedential value.
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29 ¹⁸ Application for Direct Review, at 5-6

30 ¹⁹ Application for Direct Review, at 6 [citing *Davidson Serles & Assoc. v. City of Kirkland*, 159 Wn.App. 616
31 (2011); *Brinnon Group v Jefferson County*, 159 Wn.App. 446 (2011); *Tacoma v. North Shore Investors*, 158
32 Wn. App. 1041 (2010). See also, CPSGMHB Board cases related to master plans – *Laurelhurst Community Club v. Seattle*, CPSGMHB Case No. 03-3-0008; *Laurelhurst Community Club v. Seattle*, CPSGMHB Case No. 03-0016; *NENA v. Everett*, Case No. 08-3-0005; *Davidson Serles v. Kirkland*, Coordinated CPSGMHB Case Nos. 09-3-0007c and 10-3-0012.

1 Having found that the criteria of RCW 34.05.518(3) are satisfied, **the Board issues a**
2 **Certificate of Appealability** as to the February 15, 2011 Order on Motions in this matter.

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4 SO ORDERED this 21st day of April, 2011.

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David O. Earling, Presiding Officer

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Margaret A. Pageler, Board Member

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Raymond L. Paolella, Board Member